

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2352

ORIGINAL

To be argued by
BERTRAM PERKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELM, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

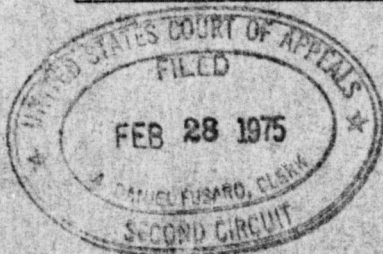
—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF DEFENDANT-APPELLEE, DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN



BERTRAM PERKEL
150 East 58th Street
New York, N. Y. 10022
(212) 753-7500

*Attorney for Defendant-Appellee
District Council 37 Health &
Security Plan*

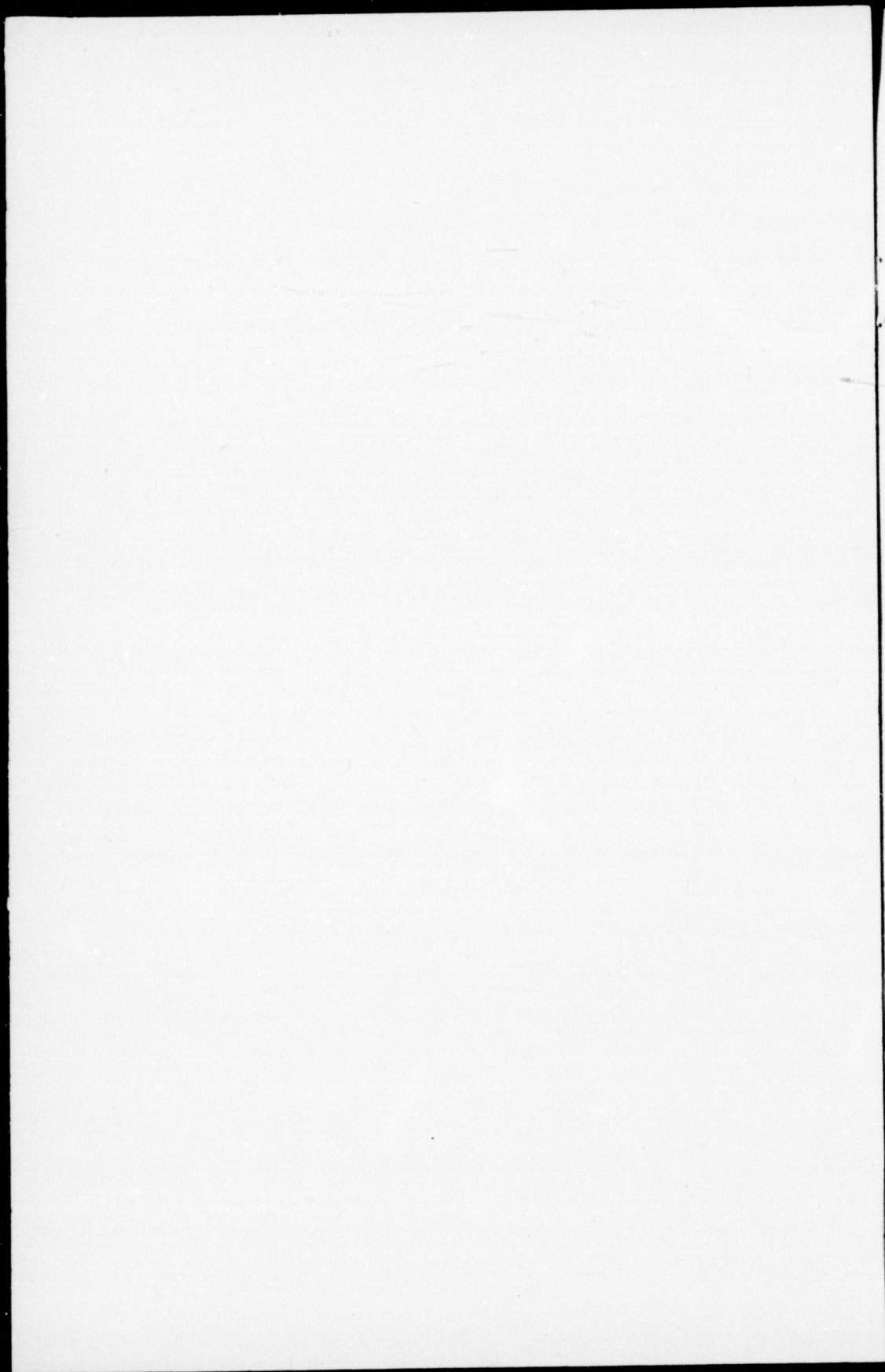


TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	2
STATEMENT OF ISSUE PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	2
A. The Relevant Parties	2
B. The Relevant Claim	3
C. Opinion of the Court Below	5
D. Summary of Argument	5
ARGUMENT:	
I. Plaintiffs complaint against defendant H & S Plan was properly dismissed for failure to state a cause of action by reason of plaintiffs' failure to allege that defendant H & S Plan has established an existing schedule of bene- fits which currently provides greater bene- fits to men as opposed to women	6
A. General Statement	6
B. The Disability Claim	12
C. The Major Medical Claim	15
D. Summary	17
CONCLUSION	18

Cases Cited

Bartmess v. Drewreys, Limited U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), <i>cert. den.</i> 404 U.S. 939 (1971)	7
Fitzpatrick v. Blitzer, 8 FEP 875 (D. Conn. 1974)....	7, 8

	PAGE
Frontiero v. Richardson, 411 U.S. 677 (1973).....	9
Geduldig v. Aiello, 417 U.S. 484 (1974).....	6, 9, 10
Reed v. Reed, 404 U.S. 71 (1971).....	9
Rosen v. Public Service Gas Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973).....	7, 8
Satty v. Nashville Gas Co., 74-288-NA-CV (D.C.M.D. Tenn. 1974)	16

Statute Cited

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)	2
--	---

United States Court of Appeals

FOR THE SECOND CIRCUIT

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELM, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

**On Appeal from the United States District Court
for the Southern District of New York**

**BRIEF OF DEFENDANT-APPELLEE, DISTRICT
COUNCIL 37 HEALTH & SECURITY PLAN**

Preliminary Statement

This brief is subnitted by defendant-appellee District Council 37 Health & Security Plan in support of the unreported decision of the United States District Court for the Southern District of New York dismissing plaintiffs-appellants' complaint for failure to state a cause of action, upon which relief can be granted.

Statement of Issue Presented for Review*

Whether a complaint which merely asserts that Defendant District Council 37 Health & Security Plan ("H&S Plan") has discriminated against women by failing to include, within its otherwise broad plan of health and disability benefits, pregnancy and related disabilities as covered risks, states a cause of action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000(e) *et seq.*?

Statement of the Case**

A. The Relevant Parties:

Defendant H & S Plan is a non-contributory union welfare fund (21a) which is a creature of the collective

* Plaintiffs have, in this omnibus litigation, sued many and various defendants. The issue presented for review in this brief, is that single issue which is applicable to the one cause of action asserted against Defendant District Council 37 Health & Security Plan.

** Plaintiffs brief, unfortunately, fails to parse out their complaint which asserts some 11 causes of action against 17 separate defendants. The statement of the case in this brief, addresses itself to that *one* cause of action which is brought against defendant H & S and, except where required for clarity, does not treat with the complaint as a whole.

bargaining agreements between the Defendant City of New York ("City") and Defendant District Council 37, AFSCME (AFL-CIO) ("D.C. 37"). This welfare plan covers all employees in the relevant units and their families without regard to sex and provides the traditional supplemental coverage found in plans of its type, including dental, major medical, optical, drug and disability benefits. For the purposes of this motion it is admitted that no covered employee or his family is entitled to receive a major medical benefit for any condition arising out of the state of pregnancy nor is any covered employee entitled to a benefit which arises out of a disability caused by pregnancy.*

Plaintiffs are a group of persons, both male and female, who are employed by the City of New York, or its related agencies, who have brought the present action on behalf of themselves and as representatives of a class which is composed of "all female" employees of the City of New York . . . who are capable of becoming pregnant or did become pregnant; and (2) males employed by the City . . . who . . . had a wife or a female dependent capable of becoming pregnant or who became pregnant (3a-4a) (emphasis supplied).

B. The Relevant Claim:

Plaintiffs have asserted a single claim and cause of action against defendant H & S Plan. That single cause of action alleges that defendant H & S Plan has violated Title VII of the Act by discriminating against plaintiffs' and the class they represent;

* The benefits provided by defendant H & S Plan accrue to a covered employee *and* his family *except* for the disability benefit which accrues exclusively to the covered employee himself.

"because of their sex in that defendants[*] have established and administered the D.C. 37 Health & Security Plan which offers no temporary disability benefits for pregnancy and pregnancy related conditions while wage replacement disability benefits are paid for temporary disabilities resulting from other conditions.

* * *

[and] which includes a Family Major Medical Option . . . [excluding] expenses for normal pregnancy (37a-38a).

In reverse order, the complaint addresses itself to two claimed discriminatory practices engaged in by defendant, H & S Plan.

The latter claims that title VII is violated when defendant H & S Plan provides medical coverage to all employees, male and female, and their families, which coverage denies pregnancy related benefits to the covered employee herself, if she is female, or if the male is the covered employee, to his spouse or dependent.

The other claimed violation of title VII follows from the assertion that while defendant, H & S Plan provides a disability benefit, i.e., "wage replacement", for all covered employees, both male and female, it does not include within that general coverage, additional coverage for that special gender related disability particular to women, to wit pregnancy.

* The City of New York and D.C. 37 are also named as defendants in this cause of action. Since defendant H & S Plan is a separate trustee qualified benefit plan, the nexus of these additional defendants to this particular cause of action is unclear. The writer submits that it may be assumed that they are named in this particular part of the complaint by reason of the fact that defendant H & S Plan's existence grows out of collective bargaining agreements between the two above added defendants.

C. Opinion of the Court Below:

The court below dismissed plaintiffs' complaint for failure to state a cause of action. The District Court opined that the mere fact that the complaint alleges the existence of benefit and disability programs which make distinctions in coverage based upon the state of pregnancy does not support a cause of action asserting an unlawful discrimination based upon sex or gender (296a).

The Court below noted that the "threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities [standing alone] can be classified as discrimination because of sex (or gender)." (297a). In answer to this question the District Court held that the existence of a "disparity of treatment based upon pregnancy does not in and of itself constitute such discrimination". (299a). In support of its disposition in this case, primary reliance was placed by the District Court upon *Geduldig v. Aiello*, 417 U.S. 484 (1974) and in particular upon footnote 20 of that opinion found on pages 496-7.

The Court below, recognizing that plaintiffs would have a cause of action *if* they could allege that the existing benefits provided by the benefit plans in question were in and of themselves discriminatory, as opposed to the mere failure to include a single gender related risk, gave plaintiffs the right to replead their case asserting these facts (299a-303a). Plaintiffs waived this right to replead and consented to the entry of a final judgment against them (314a).

D. Summary of Argument:

Plaintiffs' complaint fails to state a cause of action against Defendant, H & S Plan. *Nowhere* in the single

cause of action asserted against this defendant do plaintiffs *allege* that the *benefits provided have a discriminatory impact*.

To the contrary, Plaintiffs ignore the existing benefit structure and go outside of it in order to manufacture their claim of discrimination. Plaintiffs have failed to allege that the existing benefit structure gives men greater advantages than women. Until that is asserted, no claim for discrimination is made out.

The mere fact that a single gender related risk is not included within an otherwise sexually neutral schedule of benefits,* cannot serve to create a violation of Title VII.

POINT I

Plaintiffs' complaint against defendant H & S Plan was properly dismissed for failure to state a cause of action by reason of plaintiffs' failure to allege that defendant H & S Plan has established an existing schedule of benefits which currently provides greater benefits to men as opposed to women.

A. General Statement:

The decision of the Supreme Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974) was correctly interpreted by the District Court as signaling a return to the basic princi-

* No claim is made by plaintiffs that the existing benefit structure favors males as opposed to females nor have plaintiffs availed themselves of the opportunity to amend their pleading accordingly. For the purpose of this appeal, therefore, the sexual neutrality of the benefit structure within itself must be deemed true.

ple of law which has traditionally controlled the focus of questions involving claims of unlawful discrimination.*

That principle in the labor relations field, simply stated, is that when one provides benefits to employees or prospective employees, access to those benefits must be equally available to all without regard to sex or race. That principle is further refined by the fact that not only must there be equal access, but there must be equal value upon access. Essentially whatever benefits are to be provided to employees must be provided with a level hand and in a sexually and racially neutral manner.

There can be and is no disagreement between plaintiffs and defendant H & S Plan on this proposition. For example, on page 12 of plaintiffs' brief they cite the cases of *Bartmess v. Drewreys Ltd. U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), cert. den. 404 U.S. 939 (1971); *Rosen v. Public Serv. Elec. and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); and *Fitzpatrick v. Blitzer*, 8 FEP 875 (D.C. Conn 1974). In each of these cases discriminatory conduct was found for there was an employment advantage given to one group which was not given to another—and that excluded group was a protected class.

In *Bartmess*, male employees, as a class were permitted to work at their jobs until their mandatory retirement age of 65 was reached. Female employees, on the other hand, were forced to retire at age 62 and could not work to age 65. It is clear from this, that all female employees, a protected class, were deprived of the right to continued

* It is important to note the obvious at this point. All choices are discriminations. However, all discriminations are not unlawful. The use of the word "discrimination" in this brief and, it is submitted, in the *Aiello* case refers exclusively to "unlawful" discrimination and does not mean that no "choices" have been made within comprehensive programs which may result in particular points of differential treatment in minor ways within the classes affected.

employment and the opportunity to earn income up to age 65—while men were *given* this right.

In *Rosen* the court was faced with a complex pension plan which, under certain circumstances, allowed for the fact that a woman could retire at a given age with a given pension while a man, with the same years of service and the same retirement age, would get a lesser pension. In this case also the Court found a protected gender related class, albeit male, which was not receiving a benefit which was being *given* to similar female employees.

In *Fitzpatrick*, the Court was again faced with a gender related class of employees which were not being given benefits that were available to other similar employees. The State Retirement System in Connecticut allowed "women employees having 25 or more years of state service, the right to retire with full pension rights five years earlier than men with identical service qualifications." *Fitzpatrick v. Blitzer*, *supra* at 878. The system also had a reduced retirement benefit formula applicable to those who retired earlier than the normal retirement date. Once again males, as the protected gender related class, complained they were being discriminated against in favor of females in that, as a class, females were *given* better retirement benefits than males—and once again that relief was granted.

The above cases merely touch upon this area which is replete with similar applications of the law as all understand it (see Appellants' Brief p. 19 fn. 12) and plaintiffs and defendant H & S Plan are at one on this issue.

It is against this background that the *Aiello* case must be examined. Regardless of the theory upon which one believes *Aiello* was decided, one thing stands out clearly. *In order to make out a case for discrimination based*

upon sex one must prove that the existing benefits, as given, have a discriminatory impact upon a protected class.*

Here again we have a proposition upon which both the plaintiffs and defendant H & S Plan agree. As plaintiffs state in footnote 23 on page 38 of their brief "the [discriminatory] impact of a classification is measured by how effectively it operates to exclude only members of the protected class" from the benefits *being provided*.

In essence one does not and may not go outside of the benefits being provided to determine whether there is a discriminatory practice which has an adverse impact upon a protected class. One looks at the benefits being provided, the classes covered and determines whether all classes have an equal opportunity to avail themselves of benefits of equal value. If that question is answered negatively nothing further need be shown—for discrimination exists. If that question is answered affirmatively then judicial inquiry stops there for no discrimination has been shown. To go beyond that point and evidence that additional gender related benefits have not been given and would be beneficial to a protected class, does not go to the proof of discrimination but goes to another question not in issue here—affirmative action.

It is respectfully submitted that the above is precisely the position taken by the Supreme Court in *Aiello*. In distinguishing *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), it said "the California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities" *Geduldig v. Aiello*, *supra* at

* This principle is not limited to sex but applies equally to any and all protected classes.

496. If one holds to the proposition that the exclusion of a gender related risk from a comprehensive program of risk protection is *prima facie* discrimination, then the above quoted sentence is unintelligible and confusing at best.

However, if one's starting point for inquiry is the impact of the actual benefits being provided to the covered classes, then the above quote is clear.

The California disability program did not exclude anyone from benefit coverage because the benefits *as provided* treated all persons alike. Men and women collectively had the same opportunity to draw down the *existing* benefits which had equal value and therefore there was *no adverse impact upon a protected class*. The mere fact that one particular gender related risk, pregnancy, was not included is irrelevant because the existing plan and protections provided by the existing coverage was sexually neutral and had no factors *within it* which caused an adverse impact upon women.

This approach is the only one which brings sense to the balance of the Supreme Court's statement in *Aiello*. The Court went on to say:

"The program divides potential recipients into two groups—pregnant females and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes". *supra* at 496-497 fn. 20.

If one merely looks at benefits *not* being provided to a protected class in order to determine whether there is an alleged discriminatory practice, then again we find the Supreme Court speaking with the voice of Lewis Carroll.

However, if one focuses on the impact of the *benefits actually provided* to protected classes, then one clearly sees what the Supreme Court was saying. The benefit program *as it was constituted* provided equality of treatment to all persons covered by it—both male and female. Within that framework there was no protected class which could show or allege any adverse impact. There was, therefore, nothing discriminatory within the benefit package itself.

To the contrary, there is strong suggestion to the effect that a pregnancy disability benefit may be discriminatory against males! If “the fiscal and actuarial benefits of the program” *as constituted* accrue to “members of both sexes” equally, then adding coverage for a gender related risk which is exclusively female could operate to deprive males of the “fiscal and actuarial benefits” attendant upon the cost of that special benefit.

It is respectfully submitted that the above is the basis upon which the Court below dismissed plaintiff's complaint. As the District Court stated, the “disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition of either Title VII or of the Fourteenth Amendment.” (303a)

The following analysis of the relevant portions of the complaint itself will show that plaintiffs have failed to plead anything more the existence of an under-included gender related risk as the basis of their cause of action. The failure to plead that the *benefits as provided* discriminate between the classes covered was and is fatal to their complaint.

B. The Disability Claim:

Plaintiffs have alleged that defendant H & S Plan's disability benefit discriminates against women simply because it;

"offers no temporary disability benefits for pregnancy and pregnancy-related conditions while wage replacement disability benefits *are paid* for temporary disabilities resulting from *other conditions*." (37a-38a) (emphasis supplied)

At this point it is important to note what is *not* being claimed. It is not claimed that:

- 1) Men and women do not have *equal access* to the existing benefit which pays for disabilities "resulting from other conditions"; or that
- 2) Men and women cannot avail themselves equally of the fiscal and actuarial value of the *benefit being offered*; or that
- 3) The benefit, *as offered*, favors men as opposed to women.

To the contrary, plaintiffs' complaint stubbornly looks to what is not being offered as the sole basis for the alleged discrimination they complain of.* This obstinate "freedom now" pleading must fail as a matter of law.

This case, as it applies to defendant H & S Plan, does not deal with the usual employment practice discrimination which concerns itself with "firm" conditions of employment—such as the right to employment, promotion,

* Plaintiffs have refused to avail themselves of the right they had to amend their pleading to correct this defect. (300a-303a, 314a)

seniority, shift differential or job assignment. The analysis of these cases is fairly set and simple. Generally there exists an opportunity which has been *given* to a male and which has been denied to a female. For instance, if only males have been promoted to a foreman's job and there are qualified women who have been passed over and denied that opportunity, clearly a *prima facie* case for discrimination has been made out.

In that situation, and in all similar "firm" situations there exists a person who is *given* a benefit which *he currently uses exclusively* and that same benefit is *being denied to women*, a protected class, for no legal reason.

That is *not* the condition extant with the fringe benefits here in question. Fringe benefits, such as disability or major medical programs, are "soft" conditions of employment and are not so susceptible of simple analysis. The "soft" fringe benefits, such as disability payments, are a term and condition of employment that each worker hopefully will never have to use. Its availability is conditioned upon a random happening over which, as a general rule, no one group has control. It is, in essence a lottery which no one wants to win.

The method of relevant analysis of this "soft" benefit must therefore differ from that of a "firm" condition of employment. There is no man *in* a job a woman cannot be promoted to, nor is there a man *getting* a higher wage than a woman for the same work. "Soft" fringe benefits are "expectencies" and as expectencies require different analysis.

To analyze this type of "soft" benefit to determine if discrimination between sexes exists, two elements must be looked at. Since the actual *receipt* of the benefit is dependent upon a random happening, i.e., disabling sickness, one's point of inquiry must start at and include the following questions:

- a) Do men and women have equal random chance to draw down the actual benefit; and
- b) Once the benefit is drawn down do men and women receive equal value from it?

If both of these questions are answered "Yes" then it is submitted, there is no discrimination on the grounds of sex.

Surely one could not seriously dispute that a disability plan which provided for payments in the event of a disability arising out of an accidental injury on the job is sexually neutral and cannot be attacked unless women were not permitted to receive its benefits. Nor could anyone seriously dispute that as additional sexually neutral risks are added to its coverage, such as payment for disabilities arising out any accidental event or from psychiatric conditions, no discriminatory conduct occurs merely because a particular gender related risk is omitted.

There is no dispute on the above because the *benefit provided* is, as a statistical fact, random in happening and men and women have equal opportunity to obtain the protection of the existing coverage.

It is respectfully submitted that at no point, no matter how many tiers of risk coverage are added, can this type of program be deemed to discriminate against a protected class on the grounds of sex *unless* the protected class cannot draw down the *existing benefit*.

Yet, plaintiffs' complaint nowhere alleges that women, the protected class, are in any way, shape, manner or form excluded from defendant H & S Plan's program in which "benefits are paid for temporary disabilities resulting from [the covered] other conditions". (38a). Nor is it anywhere claimed that the disability risks actually covered under the term "other conditions" favors men over women.

Since this is true from the face of the complaint, plaintiffs have failed to allege their cause of action—in spite of their attempt to manufacture one by the irrelevant reference to an excluded gender related risk such as pregnancy.

C. The Major Medical Claim:

Everything which has been previously said with respect to plaintiffs' alleged cause of action concerning defendant H & S Plan's disability benefit program applies with equal vigor to that part of the complaint which relates to the existing major medical program. Again they seek to create a cause of action by the exclusive reference to the fact that pregnancy related expenses are not covered under the Plan. The actual benefit structure of the Plan is not touched upon and, for the purposes of this appeal, must be deemed equal in its application. The mere fact that this Plan does not include one gender related risk within its otherwise sexually neutral program will not support a claim of discrimination based upon sex.

The major medical benefit, however, has a separate and distinct quality which plaintiffs have not considered at all! While the disability benefit is personal to the employee, the major medical benefit attaches to the family of the covered employee. Not only is a *female employee denied* medical expense reimbursement for her pregnancy but also a *male employee is denied exactly that* medical expense *reimbursement* for his wife's pregnancy. The effect of this under-included risk within the major medical benefit structure therefore falls equally upon men and women and there is no adverse impact upon a protected class—and it is on behalf of both males and females that plaintiffs are bringing this alleged sex discrimination case (3a-4a).

As the plaintiffs themselves cite in an unreported decision on pages 66 thru 83 of their brief (*Satty v. Nashville Gas Co.*, 74-288-NA-CV (D.C.M.D. Tenn. 1974));

"There is no doubt that the [major medical] program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee—beneficiaries of the plan. The [major medical plan] proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant the insurance benefit is the same as provided to a female employee such as plaintiff.

. . .

So far as the issue relating to the [major medical] program is concerned, the court finds no distinction in the application, operation or effect of the [major medical] plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit." (App. Br. pp. 68-69)

Defendant H & S Plan respectfully submits that no better analysis of the problem exists than set out by the Tennessee court. Since "all employees, male or female, receive the same benefit", it found that there could not be a discriminatory practice based upon sex. So too, in the instant case, the major medical program in question pays or does not pay the same reimbursement to all employees regardless of sex. Since the defendant H & S Plan gives to all employees, male or female, the same benefit, it follows that the defendant H & S Plan has not engaged in any discriminatory conduct.

However, this argument almost appears superfluous as it applies to the facts of this case. Plaintiffs do not allege

that the existing major medical program discriminates against women in any of the benefits being provided. There is not one single word or claim which asserts that the covered risks favor men as opposed to women. The only "fact" alleged to support plaintiffs' claim is the omission of the single gender related risk of pregnancy.

That omission, absent a claim that the existing benefit structure, as provided, has an adverse impact upon women, a protected class, cannot support a cause of action alleging sex discrimination.

D. Summary:

All of the foregoing has shown that plaintiffs' complaint *nowhere alleges* that the *existing benefit programs* administered by the Trustees of the defendant H & S Plan have an *adverse impact* upon a protected class—*women*. Without such an allegation plaintiffs have not stated a cause of action and the mere existence of an excluded gender related risk—pregnancy—does not cure that defect.

CONCLUSION

The decision of the District Court dismissing the complaint as it applies to defendant Health & Security Plan should be affirmed.

Dated: New York, New York
February 26, 1975

Respectfully submitted,

BERTRAM PERKEL
150 East 58th Street
New York, N. Y. 10022
*Attorney for Defendant-Appellee
District Council 37 Health &
Security Plan*

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WOMEN IN THE CITY GOVERNMENT UNITED et al,

Plaintiffs-Appellants,

---against---

THE CITY OF NEW YORK, et al,

Defendants-Appellees.

AFFIDAVIT
OF SERVICESTATE OF NEW YORK,
COUNTY OF New York, ss:Harold ^Udash

deposes and says that he is over the age of 21 years and resides at

being duly sworn,
2346 Holland Avenue
Bronx, N. Y.

That on the 27th day of february, 1975, 19

he served the annexed brief of defendant-appellee, District Council 37 Health & Security Plan
UPON:

1. Rabinowitz, Boudin & Standard, attorneys for a plaintiffs-appellants; 30 E. 42nd St. , N.Y, N.Y.
2. W. Bernard Richland, Comp. Counsel of the City of N.Y.: Municipal Bldg, N.Y, N.Y.
3. Edward L. Johnson, att. for def., N.Y. C. housing Authority, 250 Broadway, N.Y, N.Y.
4. Breed, Abbott & Morgan, att. for defendants, Associated Hospital Service & United Medical Service; One Chase Manhattan Plaza, N.Y, N.Y.
5. Trubin, Sillcocks, Edelman & Knapp, Esqs. att. for def. Group Health Inc., 375 Park Avenue N.Y, N.Y.
6. Delson & Gordon, attorneys for defendants, United Fed. of Teachers, 230 Park Avenue N.Y, N.Y.

/

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 27th
February, 1975
day of _____, 19____

} *Harold Sudach*

Roland W. Johnson

1a

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509905
Qualified in Delaware County
Commission Expires March 30, 1975

services of three (3) copies of

the within

Brief of def-appellee
D.C. 37/1000

hereby admitted this

27th

of

February

, 1975

Mark, Barr, Salter & Lind

Attorney for

def-appellee

Small Claims Exp. No. 371

"

welfare Fund.

OFT Welfare Fund.

